

May 21, 2018

Exhibit 4

Testimony of Holly Franz  
Panel Discussion On Water Rights Changes  
Water Policy Interim Committee  
May 21, 2018

Comments regarding the change process:

- Water right owners file change applications and object to the change applications of others. When water users are applicants, they want the process to be easy. When water users are objectors, they want the process to be difficult.
- Water is a unitary resource. One person's use impacts another person's use.
- New permits and changes are different. The new permit process is designed to protect senior users, while the change process is designed primarily to protect junior users.
- Changes are different from the adjudication process. The adjudication generally does not decree the volume or total amount of water diverted for an irrigation right; doesn't decree the pattern of using a water right; and doesn't decree the historic consumptive use of a water right. These are the primary considerations in the change process.
- Flood irrigation results in return flows that are relied upon and used by downstream water users. The change process protects return flows and the water users that rely on those return flows.
- The burden of proof is on a change applicant, while the burden of proof in the adjudication is on the objector. Because the adjudication assumes a water right claim is correct, at times, invalid or exaggerated water rights slip through the adjudication process. In the change process, the burden is on the applicant to prove the change will not injure other users. If a water user is successful in having an exaggerated water right adjudicated – essentially a paper right - that user will likely be disappointed in the change process where they have the burden of proof.

Recommendations:

1. The Trout Unlimited law review article discusses the Colorado system which grants the judge or agency discretion to require reconsideration of a change after implementation to insure no injury occurs to existing water rights. Since changes are granted largely on the opinions of experts regarding what may happen, the actual impacts may be different than the expert's opinion. In highly contested changes, this provision would allow the agency to review the change authorization after implementation to determine if additional conditions are necessary to protect other water users.
2. Recognize that changes may be harder to obtain in closed basins since there are more water users that need to be protected.

3. The process only allows DNRC to issue one deficiency letter. It would be helpful to grant DNRC discretion to respond to a deficiency letter response with a second, follow up deficiency letter if the first response does not resolve the deficiency. Current statute (85-2-302(7)) requires an application to be terminated if the deficiency is not corrected within 90 days.
4. Clarify that an applicant may waive any deadline for DNRC to act within a certain time period.
5. Clarify that if DNRC grants an extension for the response to a deficiency letter as allowed in 85-2-302(6), the priority date of the permit application stays the same. This primarily applies to new permit applications.
6. Staff turnover can impact the processing of change and permit applications. Anything that can be done to support staff training and foster consistency will help.